STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2012
v	No. 303748 Isabella Circuit Court
STEPHEN HARALD LYTTLE, Defendant-Appellant.	LC No. 2010-001238-FC

Before: FORT HOOD , P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm, MCL 750.84, two counts of felonious assault, MCL 750.82, and domestic violence, MCL 750.812. We affirm.

During the pendency of the defendant's divorce from Tracy Lyttle after a lengthy marriage, defendant convinced Tracy to meet him to discuss the divorce. They sat down in defendant's living room and defendant informed Tracy that he did not want her to keep the name "Lyttle." When Tracy told defendant that she was not going to change her name, he stood up in front of her with a bat and swung it at her head. However, she leaned back into her seat, pulled her feet up and took the impact on her feet. She stood up and tried to kick defendant but he was wearing an athletic cup, so she tried to run. However, defendant grabbed her by the hair and pulled her back. They struggled and fell to the ground. At some point Tracy bit defendant on the chest. Defendant pinned Tracy and then pulled a knife from his pocket and started trying to stab her. She held off his attempts at stabbing her and convinced him to talk. He then tried to persuade her to go into the bedroom. She refused. When defendant stood up and began walking to the bedroom, Tracy ran to a neighbor's home.

First, defendant argues that testimony was erroneously admitted about his drug use, his admission to a "psych ward," and religion. He failed to object. Therefore, he can obtain relief only if there was plain error; defendant must prove the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person, then reversal is warranted. *Id.* However, a party is not entitled to relief if the party contributed to the error. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant argues that the testimony was inadmissible hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. MRE 801(c). Here the challenged statements are not hearsay because they were made in court, while Tracy was testifying. Also, the statements were not offered for the truth of the matter asserted. Tracy was indicating how defendant's drug use, defendant's admission to a "psych ward," and individual prayer affected her. The statements were not offered to prove defendant's drug use, or that defendant had in fact been admitted to a "psych ward," or that people were praying for Tracy.

However, defendant further argues that the testimony was irrelevant or prejudicial and deprived him of a fair trial. We disagree.

Regarding defendant's drug use, defendant claims it was error to allow Tracy to testify that he was abusing prescription drugs. However, during opening statement defense counsel said, "You'll learn through the course of the trial that Stephen had a drug addiction to pain killers." Thus, defense counsel opened the door to questions relating to defendant's drug use. Moreover, defense counsel questioned both Tracy and David Thayer (Tracy's son-in-law) about defendant's drug use. Defendant cannot claim he was denied the right to a fair trial when defense counsel continually addressed the issue of defendant's drug use.

Tracy also stated that she "knew that [the police] were going to be taking [defendant] again to another psych ward and that he would be released and I would really feel the consequences of his anger." The prosecutor had asked Tracy if she had pressed charges against defendant because of an incident in 2007. The response from Tracy was not what the prosecutor was trying to elicit. Unresponsive answers to proper questions are not grounds for granting a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Furthermore, the prosecutor did not mention or in any way address the comment about defendant going to a "psych ward" again. This was not plain error affecting a substantial right.

However, even if this testimony were error, defendant did not move for a curative instruction and then he contributed to any error. During cross-examination of Thayer, counsel inquired about defendant's threats of suicide in 2007 and asked if Thayer gave him a ride to the hospital. Although there was never a specific mention of a "psych ward," the implication and inference that arises from the exchange is that defendant was being hospitalized for psychiatric treatment. Once again, defendant cannot claim error when he contributed. *Gonzalez*, 256 Mich App at 224. Moreover, defendant has failed to demonstrate that this testimony resulted in the conviction of an actually innocent person. *Carines*, 460 Mich at 763.

The last excerpt of testimony defendant challenges was a statement from Tracy that she could testify calmly because there were people praying for her. Defendant argues that this statement improperly interjected religion into the trial. MCL 600.1436 provides that no witness may be questioned about his opinions on religion. However, "[a] prosecutor has no duty to caution a witness to refrain from discussing religion in an answer." *People v Vasher*, 449 Mich 494, 499; 537 NW2d 168 (1995). Moreover, here the prosecutor asked, "Are you able to explain why you're able to calmly recount these things for the jury?" The context of the questioning revealed that the prosecutor was inquiring about Tracy's demeanor on the stand, not her religion or beliefs. The prosecutor did not mention Tracy's statement in closing argument. A

nonresponsive answer that brings religion into the proceeding does not, by itself, create an error requiring reversal. *Id.*

Next, defendant argues that OV 10 was improperly scored because there was no exploitation of a vulnerable victim. We disagree.

Legal questions, like the interpretation and application of the sentencing guidelines, are reviewed de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008). However, the trial court's findings of fact are reviewed for clear error. *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). The trial court has discretion to determine the number of points that are appropriate for each offense variable, as long as there is evidence on the record supporting the score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009).

OV 10 takes into consideration a vulnerable victim and MCL 777.40(3)(c) defines vulnerability as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(1)(b) says that ten points are appropriate for OV 10 when "the offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." A domestic relationship is a familial or cohabitating relationship. *People v Jamison*, 292 Mich App 440, 447; 807 NW2d 427 (2011). Exploit means that the defendant manipulates the victim for selfish or unethical reasons. *People v Phelps*, 288 Mich App 123, 136; 791 NW2d 732 (2010). Therefore, in the context of OV 10, a score is justified when the defendant manipulates a victim that is apparently susceptible to injury, restraint, or temptation for selfish or unethical reasons. *Id.*; see, also, MCL 777.40.

The parties do not dispute that defendant and Tracy were in a domestic relationship. See *Jamison*, 292 Mich App at 447. The question is whether defendant exploited a vulnerable victim. Tracy testified that defendant repeatedly called her over the course of July 8 and 9, 2010, asking her to go to dinner or come over to talk to him. Tracy also indicated that defendant told her he was more depressed than he had been in many years, a tactic defendant would always use to get Tracy to go to him immediately. Eventually, Tracy agreed to see defendant after two days of repeated telephone calls. There was evidence presented to support the idea that defendant was using tactics he had employed in the past to manipulate Tracy into seeing him. Vulnerability for OV 10 is the "*apparent susceptibility of a victim to* injury, physical restraint, *persuasion, or temptation*." MCL 777.40(3)(c)(emphasis added). Based on defendant's knowledge of Tracy it was apparent to him what he had to do to persuade or tempt her into coming to his home for a conversation. Moreover, he used this knowledge about her vulnerability to his depression and mental state to manipulate her into going to the condo for a conversation. Although Tracy arrived at the condo of her own free will and defendant told her they could have the conversation another day, the events leading up to her arrival were because of defendant's pressure and manipulation. The trial court did not err in assessing ten points for OV 10 because there was evidence on the record to support the score.

Defendant also argues that there was no continuing pattern of criminal behavior and that 25 points were therefore improperly scored for OV 13. Defendant argues that there was only one criminal act because the convictions all arose from the same incident. We disagree.

MCL 777.43(1)(c) indicates that 25 points are appropriate if "the offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." To determine the appropriate score for OV 13, all crimes within a five-year period including the sentencing offense should be counted. MCL 777.43(2)(a). There is nothing in the language of MCL 777.43 to support the contention that multiple convictions arising from the same incident cannot be considered for OV 13. Moreover, in *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001), this Court upheld a score of 25 points for OV 13 where the defendant had four concurrent convictions. Also, in *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005) this Court upheld a score of 25 points for OV 13 where the defendant was convicted of three crimes involving a person, and had two additional pending charges. These cases indicate that when multiple convictions arise from one set of facts, scoring OV 13 is appropriate. *Wilkens*, 267 Mich App at 744; *Harmon*, 248 Mich App at 532. Thus, the trial court did not err when it assessed 25 points for OV 13 because the record indicated that defendant had committed at least three crimes against a person.

Next, defendant argues that there were errors in calculating the amount of restitution he was ordered to pay. We disagree. The prosecution bears the burden of proving the amount of restitution; however, a defendant can request an evidentiary hearing to challenge the amount. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). Absent a challenge from the defendant, the trial court may rely on the amount of restitution set forth in the PSIR. *Id*. at 276 n 17.

Defendant did not request an evidentiary hearing and instead objected on the record to the amounts. The trial court heard argument from both sides and ultimately decided to award the amount of restitution set forth in the presentencing report. Defendant fails to present any persuasive argument as to how he arrived at the conclusion that the restitution was incorrect. He merely alleges that there are errors but does not demonstrate or indicate how he arrived at that conclusion. A party cannot simply assert an error or announce a position and then leave it to this Court to '"discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (citations omitted).

Next, defendant argues that he was denied a fair trial when defense counsel waived the self-defense jury instruction. We disagree. Instructional errors are reviewed de novo unless the errors were not preserved. *People v Martin*, 271 Mich App 280, 353; 721 NW2d 815 (2006). Unpreserved instructional errors are reviewed for plain error affecting substantial rights. *Id*. When the defendant intentionally relinquishes or abandons any known right it constitutes waiver. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). When there is waiver of a right, there will be no review because the waiver extinguishes the right. *Id*. Waiver can occur when defense counsel agrees with or expresses satisfaction with a trial court's decision. *Id*.; *People v Hall*, 256 Mich App 674, 678-697; 671 NW2d 545 (2003). In this case, defendant waived his right to an instruction on self-defense.

Lastly, defendant argues that he was denied the effective assistance of counsel because counsel failed to properly object to inadmissible evidence and waived the instruction on self-defense. We disagree. Defendant failed to preserve this issue by motion for a new trial or an

evidentiary hearing. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1 § 20. Generally effective assistance is presumed and the defendant carries the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). In order to prevail on a claim of ineffective assistance of counsel the defendant must show that counsel's performance was deficient and that but for the deficient performance the outcome of the trial would have been different. *People v Payne*, 285 Mich App 181, 188-189; 774 NW2d 714 (2009).

Counsel has wide discretion when it comes to matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court will not second guess counsel's strategic decisions with the benefit of hindsight. *Id*. Matters that are trial strategy include whether to object to evidence or arguments, whether to call or question witnesses, and what evidence to present. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *Unger*, 278 Mich App at 242. Trial counsel's decision whether to request a specific instruction can also be a trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003).

Defendant has failed to demonstrate how counsel's actions were anything other than trial strategy. Counsel is not required to consult with the defendant on every tactical decision. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). Counsel will only be ineffective if the strategy employed was unreasonable or unsound. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). In this case defendant has not demonstrated that any of the trial strategy employed by counsel was either unreasonable or unsound. Nor are there any apparent errors on the record that indicate counsel was ineffective. See *Unger*, 278 Mich App at 253. Defendant has failed to carry his burden of proving that counsel was ineffective. See *LeBlanc*, 465 Mich at 578.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly